IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
February 9, 2007 Session

ASHTON SCOTT ADAMS v. HENDERSONVILLE HOSPITAL CORP., ET AL.

Appeal from the Circuit Court for Sumner County
No. 25050-C C.L. Rogers, Judge

No. M2006-01068-COA-R3-CV - Filed on May 18, 2007

Patient presented to hospital emergency department with complaints of high fever, body aches (specifically in her right knee and calf), vomiting, nausea, and diarrhea. Approximately four and a half hours later, patient was discharged from the emergency room with a diagnosis of flu and dehydration. The patient died three days later, and an autopsy revealed that the cause of death was septic shock, secondary to a bacterial infection. In the suit against the hospital and treating physician, Appellant submitted three suggested jury instructions to the trial court, all three of which were denied. Appellant appeals the trial court's denial of the three jury instructions, as well as a specific portion of the instructions given to the jury. The judgment of the trial court is reversed and the case remanded for a new trial.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed and Remanded

WILLIAM B. CAIN, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

Randall L. Kinnard and Daniel L. Clayton, Nashville, Tennessee; Steven R. Walker, Memphis, Tennessee, for the appellant, Ashton Scott Adams.

Thomas A. Wiseman, III, and Margaret Moore, Nashville, Tennessee, for the appellees, Hendersonville Hospital Corporation, Hendersonville Hospital Corporation d/b/a Hendersonville Hospital, Hendersonville Hospital.

OPINION

I. FACTUAL BACKGROUND

On Saturday, January 25, 2003, Candace Farris ("Farris"), thirty-two, reported to the Emergency Department at Hendersonville Hospital at 11:44 a.m. She complained of high fever,

body aches, vomiting, nausea, and diarrhea. The body aches were specifically in her neck and the calf and knee of her right leg. Farris indicated that such ailments had been present since Wednesday of the same week. The emergency physician on duty was Dr. Kevin Hattaway ("Hattaway"). Hattaway spoke with and examined Farris, and determined that she was suffering from gastroenteritis (commonly referred to as stomach flu) and dehydration, and she was discharged at 4:05 p.m. the same day. On January 26, 2003, Farris presented to Vanderbilt Medical Center with the chief complaint of right leg pain. Farris died on January 28, 2003. The autopsy report stated that "[i]n summary, the cause of death was overwhelming sepsis and resultant multi-organ system failure." Appellant is Farris's minor son, suing through his next friend and father, Randy Scott Adams (Farris's ex-husband). Appellees are the Hendersonville Hospital Corporation, Hendersonville Hospital Corporation d/b/a Hendersonville Hospital and Hendersonville Hospital. On January 23, 2004, the Complaint was filed, alleging that Farris died as a result of the negligence of Appellees in failing to diagnose, and thus timely treat, a severe bacterial infection. The standard of care of Hattaway and the Hendersonville Hospital Emergency Department staff has become the central focus of this case. Appellant alleges that Appellees were negligent in their care of Farris. The testimony of witnesses at trial regarding the care that Farris received are substantially different.

Appellant's version of the facts is as follows: The emergency room nurse examined Farris's leg and recorded a note that the calf of her right leg was tender to touch. Although the hospital's rules required vital signs to be taken and recorded every hour, Farris's vital signs were taken only upon her arrival. Such vital signs were abnormal, with a high pulse (144) and low blood pressure (88 systolic). Troy Miller ("Miller"), Farris's boyfriend, testified that because of her leg pain, he had to physically assist her in walking during her time at the emergency room. Gary Holland ("Holland") was the nurse on duty at the emergency room when Farris was discharged. Holland testified that standard nursing practice required the nurse to advise the doctor when leg pain was present, and therefore if he had seen that Farris was having leg problems he would have stopped her from leaving and notified the doctor. However, Miller testified that at the time of her discharge, Farris asked Holland about her leg pain, and Holland responded that the pain was simply the result of dehydration and loss of potassium.

Appellant alleges that Hattaway was negligent in failing to thoroughly examine Farris's leg (the only reference in her chart is his note indicating that there was "no clubbing, cyanosis, or edema"). Appellant further alleges that Hattaway should have known that Farris's vital signs were abnormal and indicative of infection. Hattaway ordered a CBC, which is a broad spectrum of blood tests, and those results were abnormal as well, indicating an extremely strong bacterial problem. In addition, Hattaway ordered a comprehensive metabolic panel which also had abnormal results. One of Appellant's experts, Dr. William Petri ("Petri"), testified that there were numerous factors that indicated that Farris was suffering from sepsis: elevated heart rate, low blood pressure, lab results indicating that the kidneys were not functioning properly, and abnormal differential in the white blood cell count. Petri further testified that if the proper treatment had been administered at Hendersonville Hospital, Farris would have had a higher likelihood of survival. Appellant alleges that Hattaway failed to recognize that the abnormal results of the various tests indicated that Farris had an infection. Appellant maintains that the standard of care required Hattaway to hospitalize

Farris and administer IV antibiotics, and his decision to discharge her fell below such standard of care.

Appellees' version of the facts is as follows: Appellees acknowledge that the information gathered by the nurse at the time of Farris's arrival at the emergency room, consisting of her vital signs and complaints (including her complaints of leg pain) were made available to Hattaway. However, Hattaway testified that Farris never complained of leg pain directly to him, and he believed that the leg pain was likely associated with generalized body aches as a result of the flu. Regarding Farris's vital signs, Hattaway testified that such signs were normal for a patient who was dehydrated, which was consistent with Farris's history of vomiting and diarrhea. Hattaway maintains that the lab work ordered was consistent with a dehydrated patient, and the results did not indicate sepsis or a bacterial infection. Also, Nurse Holland alleged that, as part of his routine, Farris would have been placed on a monitor (including blood pressure and pulse oximeter) during his shift. He maintains that he monitored Farris's vital signs at least six times that day, although he did not chart that she was on a monitor. He testified that she made no complaints about leg pain to him, as he would have charted such complaints.

Further, Appellees allege that when Farris eventually went to Vanderbilt on January 26, she underwent an x-ray, a venous Doppler, and an ultrasound (all on her right leg), all of which had normal results. Also, blood cultures and fluid were taken from around Farris's right knee, and the results were negative. Appellees allege that surgery was the only treatment that could have saved Farris's life, and stress that a surgeon was never consulted at Vanderbilt. At oral argument, Appellees asserted that even if Farris had been diagnosed at the emergency room, her condition was such that she likely would have died anyway.[1]

The trial took place from February 6 to February 16 of 2006. Before the jury was charged, Appellant submitted three suggested jury instructions to the court, which were all denied. Following the trial, the jury unanimously concluded that Appellees were not at fault, and judgment was entered in favor of Appellees. Appellant appeals the trial court's refusal to utilize any of the three Special Jury Instructions submitted. Further, Appellant appeals a specific portion of the instructions that were given to the jury.

II. STANDARD OF REVIEW

The determination of whether jury instructions are proper is a question of law. *Solomon v. First Am. Nat'l Bank*, 774 S.W.2d 935, 940 (Tenn.Ct.App.1989). Therefore, the trial court's conclusions of law will be reviewed under a purely *de novo* standard, with no presumption of correctness given to the conclusions. *Fields v. State*, 40 S.W.3d 450, 458 (Tenn.2001).

[1] The autopsy report stated the following in regard to the type of infection Farris had: "In the largest series of patients, the overall mortality rate was 29% and mortality rates have been seen as high as 76% in some studies."

III. ANALYSIS

A. Special Jury Instructions Numbers One, Two, and Three

"It is the duty of the trial judge to instruct on every issue of fact or theory of the case raised by the pleadings and supported by the proof." *Cole v. Woods*, 548 S.W.2d 640, 642 (Tenn.1977). Further,

> [T]he soundness of every jury verdict rests on the fairness and accuracy of the trial court's instructions. Since the instructions are the sole source of the legal principles needed to guide the jury's deliberations, *State ex. rel Myers v. Brown*, 209 Tenn. 141, 148-49, 351 S.W.2d 385, 388 (1961), trial courts must give substantially accurate instructions concerning the law applicable to the matters at issue. *Street v. Calvert*, 541 S.W.2d at 584; *Mitchell v. Smith*, 779 S.W.2d 384, 390 (Tenn.Ct.App.1989).
>
> Jury instructions need not be perfect in every detail. *See In re Estate of Elam*, 738 S.W.2d 169, 174 (Tenn.1987); *Benson v. Tennessee Valley Elec. Coop.*, 868 S.W.2d 630, 642-43 (Tenn.Ct.App.1993). A single erroneous statement will not necessarily undermine otherwise proper instructions that, on the whole, fairly define the issues and do not mislead the jury. *Cortazzo v. Blackburn*, 912 S.W.2d 735, 745 (Tenn.Ct.App.1995).
>
> Instructions must be viewed as a whole, *In re Estate of Elam*, 738 S.W.2d at 174; *Memphis St. Ry. v. Wilson*, 108 Tenn. 618, 620, 69 S.W. 265, 265 (1902); *Abbott v. American Honda Motor Co.*, 682 S.W.2d 206, 209 (Tenn.Ct.App.1984), and the challenged portion of the instructions should be considered in light of its context. *Gorman v. Earhart*, 876 S.W.2d 832, 836 (Tenn.1994); *Hurst v. Dougherty*, 800 S.W.2d 183, 186 (Tenn.Ct.App.1990). An erroneous instruction will not be considered reversible error if the trial court explains or corrects it in other portions of the charge. *In re Estate of Elam*, 738 S.W.2d at 174; *Smith v. Parker*, 213 Tenn. 147, 156, 373 S.W.2d 205, 209 (1963).
>
> Juries are generally composed of persons who do not have formal legal training. Accordingly, a trial court's instructions should be couched in plain terms that lay persons can readily understand. *Sasser v. Averitt Express, Inc.*, 839 S.W.2d 422, 430 (Tenn.Ct.App.1992); *Herstein v. Kemker*, 19 Tenn. App. 681, 702, 94 S.W.2d 76, 89 (1936). It also follows that appellate courts must view the challenged instructions not through the practiced eyes of a judge but rather through the eyes of an average lay juror.

Ladd by Ladd v. Honda Motor Co., Ltd., 939 S.W.2d 83, 94 (Tenn.Ct.App.1996). Regarding a party's request for a specific instruction, this Court has stated:

> [T]rial courts should give a requested instruction (1) if it is supported by the evidence, (2) if it embodies the party's theory of the case, (3) if it is a correct statement of the law, and (4) if its substance has not already been included in other portions of the charge, *Spellmeyer v. Tennessee Farmers Mut. Ins. Co.*, 879 S.W.2d

> 843, 846 (Tenn.Ct.App.1993). It should deny requested instructions that are erroneous or incomplete. *Betty v. Metropolitan Gov't*, 835 S.W.2d 1, 10 (Tenn.Ct.App.1992).

Ladd by Ladd, 939 S.W.2d at 102-3.

As this Court noted in *City of Johnson City v. Outdoor West, Inc.*, 947 S.W.2d 855 (Tenn.Ct.App.1996):

> We review the jury charge in its entirety to determine whether the trial judge committed reversible error. Jury instructions are not measured against the standard of perfection. The charge will not be invalidated if it "fairly defines the legal issues involved in the case and does not mislead the jury." Furthermore, a particular instruction must be considered in the context of the entire charge.

City of Johnson City, 947 S.W.2d at 858 (citations omitted).

Tenn. R. App. P. 36 addresses whether an error by the trial court is reversible, stating the following in relevant part:

> **Rule 36. Relief; Effect of Error.**
> . . . .
> (b) Effect of Error. - A final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process.

Appellant's Special Jury Instruction Number One asked that the trial court include the following definition of negligence, in accordance with Tennessee Pattern Jury Instruction 3.05, in the jury instructions:

> **NEGLIGENCE 3.05**
> Negligence is the failure to use ordinary or reasonable care. It is either doing something that a reasonably careful person would not do, or the failure to do something that a reasonably careful person would do, under all of the circumstances in this case.

Appellant based such request upon Tenn. Code Ann. § 29-26-115(d), which states:

> (d) In a malpractice action as described in (a) of this section, the jury shall be instructed that the claimant has the burden of proving, by a preponderance of the evidence, the negligence of the defendant. The jury shall be further instructed that injury alone does not raise a presumption of the defendant's negligence.

Tenn. Code Ann. § 29-26-115(d). Appellant maintains that the jury needed an instruction which clearly defined the critical term "negligence". Appellees argue that Appellant failed to meet the standard set forth in Tenn. R. App. P. 36(b) by proving that the abuse more probably than not affected the judgment or created prejudice in the judicial process.

When the jury instructions were being determined, the following exchange, regarding the proposed negligence instruction, took place in the trial court:

> MR. KINNARD: . . . And they – they need to know that a failure to do something can be negligence also when somebody should have done something. The nurse should have told the doctor. The doctor should have gone in. So this is really a failure to do things case. There's just one simple concept that's in the Tennessee pattern jury instructions.
> THE COURT: What we need to be careful, though, is simple negligence and professional negligence, and that's what I don't want to mess up. If I was listening correctly, I think that's the main objection, throwing that word around without care. Okay. All right. Okay. All right. Page 7, fault has two parts, negligence and legal cause. Fault is defined as, a defendant is at fault or negligent if you find that the defendant failed to act with reasonable and ordinary care in accordance. And that's the best we can do to get negligence in there three times. Twice on 7 and once on 8. And then under the statute. . . .
> MR. KINNARD: Okay. You're going to –
> THE COURT: Right.
> MR. KINNARD: Okay.
> THE COURT: So partially yes to your special request Number 1.
> MR. WISEMAN: For the record, may I just object to that, please sir?
> THE COURT: Yes, sir.
> . . . .
> MR. WISEMAN: I've got one more – one other thing, if I may quickly. It's a suggestion . . . to address Page 7 where we had this discussion about where does the word "negligent" fit in with this discussion of fault. I am concerned, Your Honor, that if you place – where you have it currently, Fault is defined as follows, a defendant is at fault or negligent if you find the defendant failed to act with reasonable and ordinary care, incorrectly obscures that fault is two different parts. Because negligence is just one of two parts of fault. And if you put fault or negligent, you are equating the two. . . . [W]e could put the defendant was negligent or failed to act. So we could put the negligent word after defendant without equating fault and negligent as the same because they are decidedly not the same.
> THE COURT: Okay.
> MR. WISEMAN: So she suggested it read as follows: Fault is defined as follows, a defendant is at fault if you find that the defendant was negligent or failed to act with reasonable and ordinary care in accordance with the acceptable standard of

professional practice, et cetera. That preserves this very important discussion about what fault is.
MR. KINNARD: I agree.

The trial court refused to include Appellant's suggested basic definition of negligence. Instead, the trial court used a more involved explanation of negligence, included in the instructions as follows, and as referred to in the discussion that took place at trial:

> The plaintiff has the burden to prove by a preponderance of the evidence, the following as to each Defendant: 1. The recognized standard of acceptable professional practice in the profession and the specialty thereof, that a defendant practices in the community in which a defendant practices or in a similar community at the time the alleged wrongful action occurred; 2. that a defendant acted with less than or failed to act with ordinary and reasonable care in accordance with such standard of acceptable professional practice; and 3. as a proximate result of a defendant's negligent act or omission, the plaintiff suffered injury which would not otherwise have occurred. If the plaintiff fails to do so, you should find no fault on the part of that defendant.
>
> . . . .
>
> Fault has two parts - negligence and legal cause.
>
> Fault is defined as follows; a defendant is at fault if you find that the Defendant was negligent by failing to act with reasonable and ordinary care in accordance with the recognized standard of acceptable professional practice and that such deviation was a legal cause of the injury or damage for which a claim is made.

A further explanation was included in the instructions as follows:

> 1. Under the law, the professional practice and care required of a physician is as follows:
>
> A physician who undertakes to perform professional services for a patient must use reasonable care to avoid causing injury to the patient. The knowledge and care required of the physician is the same as that of other reputable physicians practicing in the same or a similar community and under similar circumstances. A physician not only must have that degree of learning and skill ordinarily possessed by other reputable physicians but also must use the care and skill ordinarily used in like cases. In applying that skill and learning, a physician is required to use reasonable diligence and best judgment in an effort to accomplish the purpose of the employment.
>
> A failure to have and use such knowledge and skill is negligence. . . .
>
> You are further instructed the law holds that by undertaking treatment the physician does not guarantee a good result. A physician is not negligent merely because of an unsuccessful result or an error in judgment. Injury alone does not raise a presumption of the physician's negligence. It is a failure to act with ordinary and

> reasonable care, however, if the error of judgment or lack of success is due to a failure to have and/or use the required knowledge, care and skill under the standard of acceptable professional practice in the same or similar community. . . .

Although the trial court did not specifically set apart a definition of negligence, the instructions to the jury sufficiently defined negligence in the context of this case. Therefore, even though Appellant's definition of negligence is a correct statement of the law, and would have been proper if included in the instructions, the exclusion of such definition is hardly reversible error.

Appellant's Special Jury Instruction Number Two asked that the trial court include the following, regarding legal cause, in the jury instructions: "The legal cause of an injury is that act or omission which causes or fails to prevent an injury." Instead, the trial court charged the jury: "A legal cause of any injury is a cause which, in natural and continuous sequence, produces the injury, and without which the injury would not have occurred." Appellant believes that the instruction given misled and confused the jury. Appellant's entire theory was that the combined medical negligence of Hattaway and the nursing staff *failed to prevent* Farris's death, not that they directly caused the death. Appellant maintains that the proposed instruction satisfies all four elements identified in the *Ladd* case, and is in compliance with Tennessee law:

> In Tennessee, proximate cause has been described as that act or omission which immediately causes or fails to prevent the injury; an act or omission occurring or concurring with another which, if it had not happened, the injury would not have been inflicted. *See Deming & Co. v. Merchants' Cotton-Press, etc. Co.* (1891), 90 Tenn. 306, 17 S.W. 89; *Southeastern Greyhound Lines, Inc. v. Groves* (1940), 175 Tenn. 584, 136 S.W.2d 512, 127 A.L.R. 1378.

Tennessee Trailways, Inc. v. Ervin, 438 S.W.2d 733, 735 (Tenn.1969).

The trial court did not err in refusing to instruct the jury in accordance with Appellant's Special Instruction Number Two since the charge as given was adequate.

The refusal of the trial court to charge the jury as requested in Appellant's Special Request Number Three and the charge to the jury over the objections of Appellant about "foresight" presents a serious and complex issue.

The trial court charged the jury, over objections by Appellant, that "foresight, not hindsight, is the standard by which a professional's duty of care is to be judged" (emphasis added). It is "foreseeability," not foresight, that is an essential element of the duty of care in a tort case whether such involves a professional or otherwise. "Foreseeability" is an element of both duty and proximate cause, and it is necessary to separate the two.

We must separate these two elements as best we can because the critical portion of the jury charge in this case deals only with establishing the "duty" and does not in any way address proximate

cause. The distinction is recognized by the Tennessee Supreme Court in *Turner v. Jordan*, 957 S.W.2d 815, 818 (Tenn. 1997) but is not analyzed. We are not concerned in this case with the "hindsight" element of the charge and need not address the varied implications of a "hindsight" charge as evidenced by the extensive annotation in 124 A.L.R.5th 623 (2006).

In the case at bar we are not concerned with jury instructions as to proximate cause, but only in the context of instructions to the jury on "duty of care." The context in which the questioned instruction to the jury was given is disclosed by the record in the charge conference held by the court subsequent to the closing of proof. It is well to observe two things before discussing the charge conference.

1. The court determined to charge the jury prior to the argument of the parties.
2. Neither the court's charge nor special requests of the parties made any mention of "foreseeability," "foresight" or "hindsight" except for the questioned provision of the charge and Appellant's Special Request Number Three.

Appellant's Special Request Number Three provides in its entirety:

Foreseeability

If the court is going to instruct *anything* about *foresight*, the plaintiff requests the court to instruct as follows:

The foreseeability requirement is not so strict as to require the defendant to foresee the exact manner in which the injury takes place, provided it is determined that the defendant could foresee, or through the exercise of reasonable diligence should have foreseen the general manner in which the injury or loss occurred. The fact that an injury may be rare does not per se make it unpredictable or unforeseen. It is sufficient that harm in the abstract could reasonably be foreseen.[1]

[1]McClenahan v. Cooley, 806 SW2d 767, 775 (Tenn. 1991).

At the charge conference, the record discloses:

> THE COURT: . . . [Appellant]'s special instruction Number 3.
>
> MR. KINNARD: First, Your Honor, I object to the conclusion about foresight that you have in here.
>
> THE COURT: What page is that on?
>
> MR. WISEMAN: Page 12, Your Honor.
>
> THE COURT: Yeah, Page 12. Foresight, not hindsight, is the standard by which a professional's duty of care should be judged. Okay.
>
> MR. KINNARD: Yes, sir. We object to that, and -- but if you're going to say that, we want the foreseeability instruction given, our request Number 3.
>
> THE COURT: Okay.

MR. WISEMAN: We object to that, that special request. It -- again, it tries to rewrite what the law is. And the point of foresight, not hindsight, is not predicting what can happen in the future, which is what this foreseeability instruction Mr. Kinnard is tendering suggests. It is to say what was known at the time or what was knowable at the time is the standard by which you must judge, not with the benefit of hindsight knowing everything that happened with her death and why she died. So I respectfully submit that your instruction should stay as written, foresight, not hindsight, and deny the special request.

MR. GERACIOTI: I agree with Mr. Wiseman, and moreover, this foreseeability requirement puts overdue emphasis on the element of any tort action, whereas what's in the court's instructions now simply addressed the standard by which he's to be judge.

MR. KINNARD: Your Honor, Mr. Wiseman said I'm rewriting -- trying to rewrite the law. This is the law. It's the law of foreseeability. If you're going to get into it, I think it ought to be done in accordance with this Tennessee Supreme Court opinion.

THE COURT: I'm trying to remember --

MR. KINNARD: There's not anything in the Tennessee pattern jury instructions.

THE COURT: I didn't think there was. Interesting thought. I don't know how you would work anything into it. let's see. Okay. Well, I'm going to -- I would agree to add a little foresight, not hindsight, is the standard by which a professional duty cares to be judged. The professional to be judged are whatever, put something in there to the effect that the defendant is not -- wait a minute. The foreseeability requirement does not require the defendant to foresee the exact manner in which death would take place. I'm starting to get too close to commenting on the -- I don't know how to write it to get it in there. I don't like what you've got here at all. It's pretty much directing the way the facts should be perceived. You're really wanting to say just because the doctor didn't know what she was going to die of, that's not what we're saying.

MR. KINNARD: Well, I can't say it any better than the Tennessee Supreme Court, Your Honor.

THE COURT: I didn't mean to direct it at you.

MR. KINNARD: I know.

THE COURT: That wording is all over the place.

MR. KINNARD: It's right out of the case.

THE COURT: Especially the last sentence, I love that. It is sufficient that harm in the abstract could reasonably be foreseen. Imagine the stares we're going to get at that.

Okay. I'm going to overrule 3. If you want to dream up something else on the foreseeability, I'll try to look at it.

MR. KINNARD: Can I work on it over the lunch hour?

> THE COURT: Yeah. This one is denied. I'm having a hard time saying what I want to say, really. Okay. That's all from [Appellant], just 3?

In "Words and Phrases" Permanent Edition, Vol. 17 (2004-Suppl.2006), 180 cases from American jurisdictions are digested under the word "foreseeability" while another 89 cases are digested under "foreseeable." Only four cases dealing primarily with jury instructions in common carrier cases, are digested under the word "foresight." In all of these older cases, the use of "foresight" in defining the duty of a common carrier is condemned in the absence of a temporizing instruction to the jury that "foresight" does not mean "foreknowledge." *Fillingham v. St. Louis Transit Co.*, 77 S.W. 314 (Mo.Ct.App.1903). As stated by the Court of Error and Appeals of New Jersey:

> By 'foresight' is meant, not foreknowledge absolute, nor that exactly such an accident as has happened was expected or apprehended; but rather that the characteristics of the accident are such that it can be classified among events that, without due care, are likely to occur, and that due care would prevent. Rivers v. Penna R. R. Co., supra.

Davis v. Public Serv. Co-Ordinated Transport, 174 A. 540, 541 (N.J.1934).

In *Smith v. Chicago and A.R. Co.*, 18 S.W. 971 (Mo.1891), the Missouri Supreme Court cautioned:

> In Dougherty v. Railroad Co., 97 Mo. 447, 11 S.W. Rep. 251, which was a suit against a street railroad, we disapproved an instruction which required of the company the "exercise of the utmost human foresight, knowledge, skill, and care." This language, in the connection in which it was used in that case, conveyed the meaning that the carrier must use that precaution which one would use who knows beforehand that the accident will otherwise occur. The law does not require such foresight on the part of the carrier. 2 Shear. & R. Neg. (4th Ed.) § 496. This court has on several occasions approved the rule as given by Story, namely, that "passenger carriers bind themselves to carry safely those whom they take into their coaches, as far as human care and foresight will go; that is, for the utmost care and diligence of very cautious persons." Story, Bailm. § 601. The care required is that care, prudence, and caution which a very careful and prudent person would use and exercise in a like business, and under like circumstances, (Gilson v. Railroad Co., 76 Mo. 283;) or such skill, diligence, and foresight as is exercised by a very cautious person under like circumstances, (Furnish v. Railroad Co., 102 Mo. 438, 13 S.W.Rep. 1044;) or the utmost care and skill which prudent men are accustomed to use under similar circumstances, (Shear. & R. Neg., 4th Ed., § 405.) If parties would use the whole of some one of these or like definitions or descriptions of the duty of a carrier of passengers, instead of selecting but a few words, there would be less difficulty, and reversals prevented.

18 S.W. at 973.; *see also Freeman v. Metro St. Rlwy. Co.*, 68 S.W. 1057, 1059 (Mo.Ct.App.1902).

Commenting on a situation comparable to the case at bar, the Missouri Court of Appeals observed:

> An objection has often been raised to instructing juries by the words used in the present case, and it is not the best or the most approved form of charge. It is well to advise a jury, if requested, or even without request, that the law means by utmost care and skill the degree of those qualities used by very cautious men in the same vocation. But this is a different proposition from saying that it is reversible error to give an instruction like the one before us, and we have neither been cited to nor found a precedent holding that it is. It might well be held erroneous to refuse a request to qualify a charge like the one in question, but be held no error to give it without qualification, if the defendant made no request that it be qualified. An instruction which expresses the law truly, but in general terms, and in a manner not likely to mislead the jury, does not constitute reversible error, since the party dissatisfied with the instruction may ask one fuller and more definite. State v. Donnelly, 9 Mo. App. 519; Brown v. Railway, 13 Mo. App. 463; Browning v. Railway, 124 Mo. 55, 27 S.W. 644; Koehler v. Wilson, 40 Iowa, 183. And, generally speaking, a court is not bound to define such expressions as we are dealing with unless asked to do so. Johnson v. Ry., 96 Mo. 340, 9 S.W. 790, 9 Am. St. Rep. 351.

Fillingham, 77 S.W. at 317-18.

In these older common carrier cases, the defendant was objecting to a charge to the jury that its duty to passengers included foresight in the nature of foreknowledge. In the case at bar, it is the plaintiff objecting to a charge, which unexplained, limits the defendant's duty to cases in which the defendant had foreknowledge of death. The standard by which the duty of the defendant is measured, however, is universally held to be foreseeability, not foresight that envisions foreknowledge.

Whether a defendant is a professional or not a professional, the duty element of a tort is measured by foreseeability. *Doe v. Linder Constr. Co., Inc.*, 845 S.W.2d 173 (Tenn.1992); *West v. East Tenn. Pioneer Oil Co.*, 172 S.W.3d 545 (Tenn.2005); *Tompkins v. Annie's Nannies, Inc.*, 59 S.W.3d 669 (Tenn.Ct.App.2000); *Bara v. Clarksville Mem. Health Sys.*, 104 S.W.3d 1 (Tenn.Ct.App.2002).

The only difference in a medical malpractice case is that under the controlling statute, Tenn. Code Ann. § 29-26-115, the elements of tort must be established by expert testimony. *Moon v. St. Thomas Hosp.*, 983 S.W.2d 225, 229 (Tenn.1998). No issue is raised on appeal as to the sufficiency of expert testimony offered by Appellant to submit the case to the jury. This "subtle" distinction is of no consequence in this case. *Draper v. Westerfield*, 181 S.W.3d 283, 290 (Tenn.2005).

The trial court ventured into uncharted waters when it charged the jury that "foresight, not hindsight, is the standard by which a professional's duty of care is to be judged." Appellant objected to this charge and submitted his Special Request Number Three, insisting that if the court was going to give the "foresight" charge, it should also charge the jury as to foreseeability with the proposed Special Request taken verbatim from the Supreme Court opinion in *McClenahan v. Cooley*, 806 S.W.2d 767, 775 (Tenn.1991). If the proposed instruction was a correct statement of the law and supported by the record before the Court, Appellant was entitled to have the Special Request charged to the jury. *Rule v. Empire Gas Corp.*, 563 S.W.2d 551 (Tenn.1978); *Spellmeyer v. Tenn. Farmers' Mut. Ins. Co.*, 879 S.W.2d 843 (Tenn.Ct.App.1993); *Ladd v. Honda Motor Co. Ltd.*, 939 S.W.2d 83 (Tenn.Ct.App.1996).

Special Request Number Three was not introduced in the law by *McClenahan*, but reflects a longstanding principle of law both in Tennessee and elsewhere. As far back as 1947, Judge Sam Felts, speaking for this Court, observed:

> "If there is a substantial likelihood that certain conduct, when pursued by the defendant, will result in some appreciable harm to the plaintiff's person, then the defendant, if he so conducts (sic), cannot escape liability on the ground that he could not foresee the precise manner in which the harm would occur, nor the exact nature of the harm, nor the full extent of such harm. What must be foreseen, in order to establish negligence, is 'harm in the abstract, not harm in the concrete.' The defendant need not foresee 'that an injury should occur in the exact way or to the same extent as that which did occur.' He need only foresee that some injury of a like general character is not unlikely to result from failure to use care." Jeremiah Smith, Legal Cause in Actions of Tort," Selected Essays on the Law of Torts, 690.

Spivey v. St. Thomas Hosp., 211 S.W.2d 450, 456 (Tenn.Ct.App.1947).

The charge to the jury of "foresight" over the objections of Appellant, coupled with the refusal of the trial court to charge the jury as to "foreseeability" as requested in Appellant's Special Request Number Three, is error. The question then becomes whether or not the error is reversible under Tenn. R. App. P. 36.

One cannot study the voluminous record in this case without gaining an appreciation for the profound learning and professionalism exhibited by the trial judge and all counsel. Likewise, clearly reflected is an attentive and industrious jury recognizing the importance and seriousness of the task that was before them. All the more important is our task, therefore, under Tenn. Rule. App. P. 36(b), in determining whether the one serious error we have determined to be disclosed by the record requires reversal.

Following the charge conference in which the trial court determined to charge "foresight," deny Appellant's special request relative to "foreseeability," and charge the jury accordingly, counsel undertook to argue their case to the jury. In argument, counsel for Appellant stated:

Here's a principle. Foresight, not hindsight, is the way you look at the conduct in the case. So let's look at this again, this example.

Professional don't have to foresee the exact way somebody can get hurt if the proper treatment isn't given. They don't have to -- they don't have to know toxic shock syndrome was going to come on. They don't have to know that. What they have to know is that bad things can happen to a patient if you don't give them the right treatment and the right drugs.

This whole team, the nursing team and the ER doctor, they know that if the patient is not looked after right, the patient can be hurt. They know that. We've never said in this case that anybody had to know in that emergency room that this lady was going to get toxic shock syndrome. We have never said that.

But it's reasonable to say that if you don't treat somebody right, they can get sick and bad things can happen to them.

And so, for example, just an example in this case, if the vital signs are not normal, she's at risk for harm. You know that. You know that. That's why it's called vital signs. If they're not normal, something is wrong medically. So you need to be diligent, check, look, pay attention, be careful, and avoid causing an injury.

In argument to the jury, counsel for Appellees asserted:

The pieces of the puzzle. I really want to emphasize this. Foresight, not hindsight, is the standard by which a professional's duty of care is to be judge. We all have the benefit of hindsight. As a jury, this is very difficult because you have the benefit of hindsight too, but it is required under the law for you to not judge conduct with the benefit of hindsight, but to judge the conduct, the facts you've heard and the law, based upon what was available to the people who were involved in this case at the time and judge their conduct based upon that information at the time, not with the benefit of hindsight.

Remember, there were no changes in the color of the skin behind her leg. There was no evidence of changes to indicate that she had necrotizing fasciitis or toxic shock. As they even admit to say that a diagnosis should -- they aren't even saying that that diagnosis should have been made.

The pieces of the puzzle, all the pieces relied on the benefit of hindsight.

While the argument of counsel for Appellant was based on infinitely correct principles of law, they are principles of law that were not included in the charge to the jury inasmuch as the trial court had refused to charge the jury in accordance with Appellant's Special Request Number Three.

Counsel for Appellees in argument quoted and relied upon exactly the language contained in the charge. Thus, the written charge to the jury, which was with them in the jury room, supported exactly what Appellees' counsel had argued but provided no support at all for the argument of Appellant.

The trial court correctly charged the jury:

> All right. All the evidence is in. It becomes your duty now to find the facts from this evidence. After you determine the facts, you will then apply the law that I will give you shortly. You will apply the law whether you agree with it or not.
>
> You shall not be influenced by any personal like or dislike, prejudice or sympathy, in deciding the facts and then applying the law to those fact.
>
> I will give you many different instructions. The order in which I give you these instructions, however, has no significance. You will follow all the instructions and don't just single out one or more and ignore others.

Appellant made timely objection to the proposed charge on "foresight" and submitted a timely special request that if "foresight" was to be charged to the jury, he was entitled to have the court further charge the jury in conformity with his Special Request Number Three, which was a correct statement of the law relative to foreseeability. Appellant's actions were in compliance with proper practice. *Rule v. Empire Gas Corp.*, 563 S.W.2d 551 (Tenn.1978); *Grandstaff v. Hawks*, 36 S.W.3d 482 (Tenn.Ct.App.2000). The error under the record in this case is reversible.

The judgment of the trial court is reversed and the case remanded for a new trial. Costs of the cause are assessed to Appellees.

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WILLIAM B. CAIN, JUDGE